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Wills - Olographic - Revocation and Alteration by Erasure

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WILLS—OLOGRAPHIC—REVOCATION AND ALTERATION BY ERASURE —Doubles lines had been drawn through a part of a bequest in an olographic will. Appellees, residuary heirs, opposed probate of the cancelled part, contending that the double lines amounted to revocation of the words covered by them. On behalf of the proponents of the will it was argued that the erasure should be considered as not having been approved by the testator and should therefore be deemed under Article 1589[1] as not having been made. Circumstances and expert testimony led to the conclusion that the erasure was made by the testator. *Held,* where the court is convinced that the erasure was made by the testator, approval is to be presumed. *Succession of Butterworth,* 195 La. 115, 196 So. 39 (1940).

The precise meaning of the provision in Article 1589, that erasures not approved by the testator shall be considered as not made, has long remained in doubt.[2] The question was first presented to the court in *Succession of Müh;*[3] there, in holding that a will was revoked by destruction of the signature, the court said by way of dicta that an erasure need not be approved in writing. In *Succession of Batchelor*[4] the court held that parol evidence was admissible to establish that erasures were made by the testator and thereby approved by him. Doubt was thrown upon the subject, however, by dicta in two later cases, *Succession of Lefort*[5]

1. Art. 1589, La. Civil Code of 1870: "Erasures not approved by the testator are considered as not made, and words added by the hand of another as not written.

"If the erasures are so made as to render it impossible to distinguish the words covered by them, it shall be left to the discretion of the judge to declare, if he considers them important, and in this case only to decree the nullity of the testament."

2. Succession of Müh, 35 La. Ann. 394 (1883); Succession of Batchelor, 48 La. Ann. 278, 19 So. 283 (1896); Succession of Lefort, 139 La. 51, 71 So. 215 (1916); Succession of Tallieu, 180 La. 257, 156 So. 345 (1934).

3. 35 La. Ann. 394, 399 (1883), where the court said: "No particular method of approval is specified, nor does it seem essential that approval shall be indicated by writing, in which respect our Code differs from the English statute of Wills." The court avoided deciding the amount of proof necessary to show "approval," and said: "The erasures, which are considered not made if not approved, are those which change or strike out parts or clauses of a paper recognized as an existing will, not that part, the erasure of which would destroy it as a will." (35 La. Ann. at 399.) If approval is to be defined as intent to revoke at the time of the erasure, the distinction is not a valid one. If the signature were still legible and the absence of an intent to revoke could be clearly established, it would be absurd to conclude that there would be a revocation.

4. 48 La. Ann. 278, 19 So. 283 (1896). This case could have been decided on the basis of tacit revocation by changing the substance of the thing bequeathed.

5. 139 La. 51, 71 So. 215 (1916). The facts conclusively established that the alteration was the work of a third party and the provision "words added

and *Succession of Tallieu*,[6] indicating that mere proof that an erasure was made by the testator would not suffice to show approval.

Fortunately, practically all previous cases on the subject were considered in the instant case, and the question decided in a manner which should dispel all doubt in the future. If the court is satisfied that the erasure was the work of the testator, it will presume approval unless the contrary be shown; parol evidence and expert testimony will be admitted to prove that the erasure was made by the testator.

The decision in the principal case brings our jurisprudence into accord with that of other states having olographic will statutes,[7] although none of those states has a provision comparable to Article 1589. The French commentators attain the same result,[8] regarding the deleted part as nonexistent.[9]

One advantage of the decision is that it leaves the way open for use of any new scientific device which should prove helpful in determining whether or not the erasure was actually made by the hand of the testator.[10]

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by the hand of another shall be considered as not written" (Art. 1589, La. Civil Code of 1870) was ample grounds for the decision.

6. 180 La. 257, 156 So. 345 (1934). This case involved the question of whether erasure of part of the bequests should prove an intention to revoke the will under Article 1691, La. Civil Code of 1870. The question of partial revocation was not pleaded and the court limited itself to the issues presented. In dicta the court said: "But conceding, for the sake of argument, that the erasure of a certain clause in the body of the will would have the effect of revoking that clause, it certainly could not have the far-reaching result of revoking the will as a whole." (180 La. at 267, 156 So. at 348.)

7. In re Finkler's Estate, 3 Cal. (2d) 584, 46 P. (2d) 149 (1935); Triplett's Ex'r v. Triplett, 161 Va. 906, 172 S.E. 162 (1934); La Rue v. Lee, 63 W.Va. 388, 60 S.E. 388, 14 L.R.A. (N.S.) 968, 129 Am. St. Rep. 978 (1908). The theory in the common law states is that an erasure amounts to a re-execution of the testament. I Page, Wills (2 ed. 1926) 822, § 500.

8. 22 Demolombe, Cours de Code Napoléon (1876) 216, nos 251-252; 6 Huc, Commentaire Théorique & Pratique du Code Civil (1894) 487, no 384; 3 Josserand, Cours de Droit Civil Positif Français (2 ed. 1933) 915, no 1655; 14 Laurent, Principes de Droit Civil Français (2 ed. 1876) 263, no 239; 3 Planiol, Traité Élémentaire de Droit Civil (11 ed. 1938) 783, no 2843, 3o.

9. 5 Planiol et Ripert, Traité Pratique de Droit Civil Français (1933) 765, no 714.

10. For interesting discussions of scientific methods of proof of writings and erasures see Osborn, Questioned Documents (2 ed. 1929). See also O'Neill, The Restoration of Obliterated Ink Writing (1936) 27 J. Crim. L. 574; Sellers, The Handwriting Evidence Against Hauptmann (1937) 27 J. Crim. L. 857.